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No. 1088

In the Supreme Court of the United States

OCTOBER TERM, 1967

JAMES J. LAUGHLIN AND ALLAN U. FORTE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A–1) affirming the conviction of both petitioners under an indictment charging conspiracy and corrupting a witness is reported at 385 F. 2d 287. The prior opinion of the court of appeals is reported at 344 F. 2d 187.

The *per curiam* opinion of the court of appeals (Pet. App. A–15) affirming the conviction of petitioner Laughlin under a separate perjury indictment is reported at 385 F. 2d 295. The opinions of the district court relating to an earlier perjury indictment are reported at 222 F. Supp. 264, 223 F. Supp. 623 and 226 F. Supp. 112.

293-614—68

JURISDICTION

The judgments of the court of appeals were entered on July 28, 1967. A petition for rehearing *en banc* was denied on December 26, 1967. The Chief Justice extended the time for filing a petition for a writ of certiorari to February 5, 1968, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment (charging conspiracy and corruption of a witness) should have been dismissed on the ground that the grand jury heard illegally obtained evidence.

2. Whether petitioners can require exclusion of the trial testimony of a government witness on the ground that extra-judicial admissions previously made by the witness were coerced.

STATEMENT

Petitioners were convicted by a jury in the United States District Court for the District of Columbia under an indictment charging that they conspired with Bernice Gross, an unindicted coconspirator, to corrupt Jean Smith, a material witness in an abortion trial, and with the substantive offense of corrupting the witness. They were sentenced to imprisonment for 20 months to 5 years on each of the counts, the terms to run concurrently, and were fined $10,000 on the conspiracy count. Petitioner Laughlin was also convicted by a second jury under a second indictment charging that he committed perjury before the grand jury in

testifying that he did not know Bernice Gross, had never talked to her about the abortion case and had never talked to her over the telephone. He was sentenced to imprisonment for 20 months to 5 years, the term to run concurrently with the sentence on the first indictment. The court of appeals affirmed both convictions (Pet. App. A–1, A–15).

The sufficiency of the evidence is not challenged. The evidence is therefore summarized only briefly and in order to provide background for the contentions raised:

1. *The prosecution against both petitioners for conspiracy and corruption of a witness.* In September 1961, petitioner Forte was charged with violation of the District of Columbia abortion statute (22 D.C. Code § 201). In May 1962, while this case was pending in the district court, Forte communicated with Bernice Gross, a recently dismissed member of the abortion squad of the Baltimore Police Department, who had interviewed Mrs. Smith, the abortion victim, in the course of her duties. Forte engaged Mrs. Gross to induce Mrs. Smith not to identify him at the trial. Mrs. Smith, however, refused to lie (C. Tr. 238–243).[1]

In October 1962, Forte notified Mrs. Gross that petitioner Laughlin, his attorney, would get in touch with her (C. Tr. 243–244). Thereafter, Laughlin met Mrs. Gross at the department store where she was employed. When Mrs. Gross told Laughlin that Mrs. Smith said she would not lie, Laughlin replied, in

[1] "C. Tr." refers to the transcript of the trial in the conspiracy case. "P. Tr." refers to the transcript of the trial in the perjury case.

substance, that this was ridiculous (C. Tr. 245–248). Subsequently, at the request of petitioners, Mrs. Gross had Mrs. Smith write letters to the United States Attorney designed to bring about a dismissal of the abortion case. Mrs. Gross also delivered money to Mrs. Smith provided by Forte (C. Tr. 249–252, 258–262, 267–277). On one occasion, after Mrs. Gross told Laughlin that Mrs. Smith should be paid for writing a letter, Laughlin said he would speak to Forte (C. Tr. 275–276).

Mrs. Gross testified about her meetings and telephone conversations with petitioners. Evidence corroborating her testimony included telephone company records kept in the regular course of business (C. Tr. 1240–1242, 1652–1675), the letters sent by Mrs. Smith and the testimony of Mrs. Smith (C. Tr. 65–88).

2. *The prosecution against petitioner Laughlin for perjury.*

On February 20, 1963, Forte was acquitted by a jury under the abortion indictment. Thereafter, the January 1963 grand jury conducted an investigation to determine whether there had been any obstruction of justice during that trial. On March 6, 1963, petitioner Laughlin appeared as a witness before the January 1963 grand jury. When asked if he knew Bernice Gross, he replied that he would not know her if he met her on the street. He also denied that he had ever talked to Mrs. Gross about the abortion case or that he had ever talked to her over the telephone (P. Tr. 104–107). Mrs. Gross testified to her meeting with petitioner Laughlin at the department store

where they spoke about Jean Smith. Mrs. Gross also told about the numerous telephone conversations that she had with Laughlin (P. Tr. 382–387). Her testimony was again corroborated by telephone company records made in the regular course of business (P. Tr. 1852 *ff.*).

ARGUMENT

1. On March 1, 1963, two Assistant United States Attorneys informed Mrs. Bernice Gross that they had evidence that she had just lied to the grand jury and advised her that she had a right to talk to a lawyer before speaking to them. Mrs. Gross then admitted that she had given false testimony, repeating this admission when she reappeared before the grand jury the same afternoon. The prosecutor asked her to telephone petitioners while someone listened on an extension telephone, pointing out that the grand jury's decision whether to indict her would depend upon her cooperation. The deputy grand jury foreman also asked for her cooperation, stating that the grand jury preferred to go after the persons primarily responsible for wrong-doing, but that if lack of cooperation of witnesses makes "it impossible for us to get the big ones we'll get the little ones" (Pet. App. C–11). Thereafter Mrs. Gross made four telephone calls to petitioner Laughlin in which the topic of conversation was either her grand jury testimony or Jean Smith, the prosecutrix in the abortion trial. These conversations were recorded in the office of the United States Attorney.

During the first trial of the perjury case against petitioner Laughlin, the district court found that Mrs. Gross' consent to the recordings was not voluntary

and was not the authorization contemplated by the Federal Communications Act (47 U.S.C. 605). It, therefore, held that these recordings were not admissible in evidence. 222 F. Supp. 264. Subsequently, it dismissed the perjury indictment, concluding that, in the absence of the recordings, there was insufficient evidence before the grand jury to sustain the indictment.[2] It refused, however, to dismiss the conspiracy and corruption indictment against both petitioners on that ground. 223 F. Supp. 623; 226 F. Supp. 112. In May 1965, petitioners again moved to dismiss this indictment, on the ground that unlawful evidence was used before the grand jury. The court denied this request.

This ruling was clearly correct. As the court of appeals said (Pet. App. A–7), "there was ample competent evidence before the grand jury to justify bringing the defendants to trial on the conspiracy charge." The fact that some evidence was subsequently held to be inadmissible does not vitiate the indictment. *Holt* v. *United States,* 218 U.S. 245; *Costello* v. *United States,* 350 U.S. 359; *Lawn* v. *United States,* 355 U.S. 339.

There is no occasion for this Court to reexamine these decisions. Only recently, in *United States* v. *Blue,* 384 U.S. 251, 255, this Court held that the remedy for suppressing illegally obtained evidence does not extend to barring the prosecution altogether: "So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the

[2] The present perjury conviction arises out of a subsequent grand jury indictment.

public interest in having the guilty brought to book." This principle is equally applicable to an extension of the exclusionary rule to grand jury proceedings, as was recognized in a footnote to the Court's unanimous opinion (384 U.S. at 255, n. 3):

> It does not seem to be contended that tainted evidence was presented to the grand jury; but in any event our precedents indicate this would not be a basis for abating the prosecution pending a new indictment, let alone barring it altogether. See *Costello* v. *United States,* 350 U.S. 359; *Lawn* v. *United States,* 355 U.S. 339; 8 Wigmore, *Evidence* § 2184a, at 40 (McNaughton rev. 1961).

2. At the joint trial on the conspiracy and corruption charges, which commenced on June 2, 1965, petitioners attempted to prevent Mrs. Gross from testifying, contending that she was being coerced (C. Tr. 201–204, 217–222). Before permitting her to testify, the trial court specifically advised her that she need not testify against herself. When Mrs. Gross, a former policewoman, indicated her understanding of her rights and her willingness to testify, the court ruled that she could testify (C. Tr. 228–231). At the subsequent perjury prosecution against petitioner Laughlin alone, the court appointed an attorney to represent Mrs. Gross to make certain that she understood her rights. The trial judge also explored this matter with Mrs. Gross. Thereafter, Mrs. Gross asserted that she was willing to testify (P. Tr. 332–342). During her testimony, she said that she knew that she was not obliged to give testimony (P. Tr. 1461).

Petitioners clearly had no standing to prevent Mrs. Gross from testifying. See *Wong Sun* v. *United States,* 371 U.S. 471, 492. Neither the fact that Mrs. Gross was named as a coconspirator in one of the indictments, nor the fact that she had previously testified falsely before the grand jury, made her incompetent to testify at the trial as a government witness. These were matters for the jury to consider in assessing her credibility as a witness but are not a basis for disqualification. Mrs. Gross was in fact fully cross-examined on this point at both trials. Cases dealing with the admissibility of confessions or other testimony or evidence procured out of court (Pet. pp. 21–26) obviously are inapposite.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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